Supreme Court, U.S.
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No. 00-1798

In The

Supreme Court of the United States

LUCILLE WOLFORK, as parent and next friend of minor, CAMILLE WOLFORK and LUCILLE WOLFORK, Individually,

Petitioners,

v.

GAIL RUTH TACKETT and LEONA GATES DUNN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

RUSSELL D. WALDON
Counsel of Record
JANICE M. WALLACE
Counsel for Respondents
HARPER, WALDON & CRAIG
900 Circle 75 Parkway
Suite 1040
Atlanta, Georgia 30339
(770) 953-1710

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Did the Georgia Supreme Court err in applying the Georgia state law doctrine of judicial estoppel, as outlined in *Southmark Corp. v. Trotter, Smith & Jacobs*, 212 Ga. App. 454 (1994), to preclude the plaintiff from recovering a judgment in a personal injury action where the plaintiff debtor failed to disclose to the Bankruptcy Court, the Bankruptcy Trustee and her creditors the injury claim as a potential asset as required by law?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Defendants respectfully submit that the decision below correctly analyzed the facts and applied governing law, and that the Petition for Writ of Certiorari, presenting no valid grounds for review, should be denied.

STATEMENT OF THE CASE

This case involves an automobile accident which occurred on November 18, 1995, in which petitioners allegedly were injured. At the time of the accident, petitioner Lucille Wolfork was in Chapter 13 Bankruptcy. The bankruptcy petition was filed on August 15, 1994, prior to the accident. At the time of the accident, the bankruptcy case was ongoing. On October 21, 1997, petitioner filed a personal injury action in the State Court of Clayton County. On March 30, 1998, more than two years after the accident and six months after the filing of this lawsuit, the petitioner's bankruptcy was discharged. At no time did petitioner disclose to the Bankruptcy Court, the Bankruptcy Trustee or creditors her personal injury claim as a potential asset as required by law.

Petitioner was under an affirmative duty to supplement her bankruptcy petition to disclose post-petition assets. However, throughout the existence of the personal injury claim, the Bankruptcy Court, the Bankruptcy Trustee and the petitioner's creditors were under the mistaken belief that there was no claim which might provide additional assets to fulfill petitioner's obligations to her creditors. Moreover, at no time since the 1995

accident has petitioner attempted to reopen her bankruptcy to disclose the existence of her personal injury claim.

The trial court, the Georgia Court of Appeals and the Supreme Court of Georgia all correctly applied the Georgia state law doctrine of judicial estoppel to hold that petitioner was precluded from pursuing her personal injury action as a result of her misrepresentation to another Court.

ARGUMENT

I. Petitioner has presented no valid grounds for a Writ of Certiorari to be granted.

This case involves Georgia's application of its doctrine of judicial estoppel. There is no federal question. This is a state law tort action decided under state law principles. The fact that the state doctrine of judicial estoppel was modeled on a federal doctrine does not make this a federal law question. In a diversity action involving judicial estoppel, the United States Supreme Court has held that the doctrine of judicial estoppel is governed by state law. *See Original Appalachian Artworks, Inc. v. S. Diamond Associates, Inc.*, 44 F.3d 925 (11th Circuit, 1995).

Petitioner refers the Court to provisions of the United States Bankruptcy Code as pertinent to this case. However, this case does not involve interpretation of those code sections. This is not a bankruptcy case. The issue is whether a failure to disclose a state court tort claim to the federal Bankruptcy Court during Chapter 13 proceedings

precludes the debtor from prosecuting the state court claim. While federal bankruptcy law governs the bankruptcy proceedings, the issue here is simply the effect of a debtor's actions in bankruptcy court on his or her state court case.

The United States Supreme Court may review a final judgment rendered by the highest court of a state in limited circumstances. Petitioner is requesting this Court to review a decision of the Supreme Court of Georgia, the highest court in which a decision could be had in Georgia. Such final judgment may be reviewed by writ of certiorari where

> . . . the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C.A. § 1257(a). Petitioner has not drawn into question the validity of any United States or Georgia statute on any grounds. While she provides pertinent provisions of the United States Bankruptcy Code, she does not challenge the validity of these provisions. Further, petitioner has not argued that any title, right, privilege or immunity is at issue.

Finally, matters in abatement which do not involve jurisdiction will not be reversed by the Supreme Court. *See* 28 U.S.C.A. § 2105. The term "abatement" has been

defined to mean to overthrow or destroy an action on grounds otner than the cause of action. *Bowles v. Wilke*, 175 F.2d 35 (1949, CA7 Ill.). Summary judgment in this case was granted on grounds other than the cause of action. Summary judgment was granted based upon issues outside the petitioner's cause of action. Therefore, the matter before this Court is one in abatement and will not be reversed by the Supreme Court.

II. The Chapter 13 Trustees rights were hampered not by the state court's granting of respondent's motion for summary judgment, but by the petitioner's failure to disclose her post-petition claim.

Petitioner argues that by affirming the grant of summary judgment in this case, defendants will receive a windfall and that the real parties in interest will be harmed. Instead, the petitioner will receive the windfall. The bankruptcy trustee was discharged on March 30, 1998. Since the time of the discharge, the trustee was no longer the real party in interest. Had the bankruptcy not been discharged, the trustee would be the real party in interest to pursue the petitioner's claim. Any recovery obtained from defendants would then inure to the benefit of petitioner's bankruptcy estate, and in turn, to the creditors who asserted claims to the estate's assets. *See Clark v. Perino*, 235 Ga. App. 444 (1998). However, since the bankruptcy has been discharged, any award against the defendant will inure to the petitioner's own benefit.

Petitioner asserts, citing *In re Griner*, 240 B.R. at 439, that defendants' position punishes the creditors of the

nondisclosing debtor. In fact, petitioner, herself has punished her creditors by failing to disclose a potential asset that might provide assets to fulfill her commitments to her creditors. She cannot place blame on defendants or the Georgia courts for punishing her creditors. The Bankruptcy Court in *Griner* held that the debtors were not judicially estopped from pursuing their prepetition cause of action. However, in that case, the debtors amended their bankruptcy schedules to include the cause of action as an asset before they received their discharge.

III. There is nothing in the record to support petitioner's contention that the trial court failed to rely on evidence in granting appellee's Motion for Summary Judgment or that petitioner's assertion in bankruptcy court was not successful.

Petitioner's contention that the trial court erred by failing to rely upon evidence in granting summary judgment is without merit. There is no evidence that the issue of sufficiency of the evidence was presented at the hearing on respondent's motion. Petitioner's argument that judicial estoppel should be refused on the basis that the debtor's Chapter 13 plan provided for payment of 100% of the debt owed similarly is not supported by the record.

Petitioner's argument was addressed by the special concurrence issued by Judge Blackburn in response to the dissenting opinion in the Court of Appeals decision. *Wolfork et al. v. Tackett et al.*, 241 Ga. App. 633, 635 (1999). Judge Blackburn noted:

> it is well established that the burden is on the party alleging error to show it by the record and where the proof necessary for determination of

> the issues on appeal is omitted from the record, an appellate court must assume that the judgment below was correct and affirm. *Id.* at 635, citing *Griffin v. Travelers Ins. Co.*, 230 Ga. App. 665, 666 (1998).

Further, when a petitioner omits evidence necessary for determination of issues on appeal, affirmation is required. *Id.* The Court of Appeals relied on a presumption in favor of the regularity of the proceedings in a court of competent jurisdiction, assumed the evidence was sufficient to support the trial court's ruling, and affirmed the judgment. *Id.*, citing *Siegel v. Gen. Parts Corp.*, 165 Ga. App. 339 (1983); *Acker v. Jenkins*, 178 Ga. App. 393, 394 (1986). Likewise, this Court must assume the judgment below was correct and affirm.

IV. The Georgia Supreme Court correctly applied the state law doctrine of judicial estoppel.

Petitioner asserts that judicial estoppel should not apply to bar the instant case as there is no evidence that she intentionally asserted a contradictory position. *Chandler v. Samford University* involves facts that are strikingly similar to the facts in the case at bar. 35 F. Supp. 2d 861 (N.D. Ala. 1999). In *Chandler*, the debtor was in Chapter 13 bankruptcy when she filed an E.E.O.C. claim against Samford University. After filing the E.E.O.C. claim, the debtor converted her Chapter 13 bankruptcy to Chapter 7. She failed to disclose the existence of her E.E.O.C. claim at any time during the pendency of her Chapter 13 bankruptcy or at the time of its conversion to Chapter 7. *Id.*

The District Court held that judicial estoppel barred the E.E.O.C. claim. In so holding, the Court accepted the two-prong test for judicial estoppel, requiring a demonstration that the assertion of the claim is inconsistent with the earlier non-disclosure and that the assertion of inconsistent positions is an attempt to deliberately manipulate the judicial system. *Id.* In concluding that the facts in Chandler satisfied the second prong of the test, the Court noted first that the debtor had knowledge of her claims against Samford during the pendency of her Chapter 13 proceeding. *Id.* As support for this, the Court points out that the debtor certainly became aware of her claim when she filed an E.E.O.C. charge. Petitioner Wolfork similarly must have been aware of her personal injury claim on October 21, 1997, when she filed suit in the State Court of Clayton County. As in Chandler, this occurred during the pendency of a Chapter 13 bankruptcy.

The Court in Chandler next notes that the debtor had an affirmative duty to disclose her claim against Samford, as required by 11 U.S.C. § 541(a)(7). *Id.* Despite this affirmative duty, Chandler, like petitioner Wolfork, chose not to amend her schedule to reflect her assets.

Lastly, the Court discusses Chandler's motive for concealing her claims. In Chandler, the non-disclosure prompted the bankruptcy court to proceed as if Chandler's case were a "no asset case" and may have contributed to the choice made by the parties in interest not to raise objections to the administration of the estate. Here, petitioner's failure to alert her creditors of a potential asset likely affected the creditors' actions, as well as the creditors' ability to take any action at all.

A recent United States District Court decision analyzed Georgia law on the issue of judicial estoppel in the context of divergent pleadings filed in federal bankruptcy and state civil courts. *Scoggins v. Arrow Trucking Company*, 92 F.Supp.2d 1372 (S.D.Ga. 2000). The *Scoggins* court notes that

> judges focus on the debtor's intent, and that includes attempts to correct (rather than exploit) an unfair tactical advantage one otherwise gains by failing to timely disclose litigation claims to the bankruptcy court.

Id., citing *Reagan v. Lynch*, 241 Ga. App. 642 (1999). While application of the doctrine of judicial estoppel is severe, the court notes that "whether to apply it depends entirely on the actions of the plaintiff." *Id.* The court further concluded that the petitioner should not be allowed to reopen and amend his petition after the filing of a motion for summary judgment as "he is only disclosing the claim when forced by his adversary to do so." *Id.* at 1375.

> Scoggins should not be permitted to duck his bankruptcy court disclosure obligation, then "fess up" without consequence once exposed by his adversary. He knew of the facts giving rise to his inconsistent positions, and he had a motive to conceal this claim. That is enough.
>
> * * *
>
> Society's core message, as expressed in over 100 false statements statutes, in its bankruptcy concealment and tax fraud laws, and in its statutory prohibition against deceiving government agencies, is clear: those who actively or passively (by failing to disclose material facts) deceive the government – especially the judicial branch,

> which so heavily depends upon truthful disclosures under oath – should, at a minimum, reap no advantage from doing so. That message would be disserved by giving Scoggins a free pass here.

Id. at 1376. (Citations omitted).

Petitioner's actions are, at best, passive deception. As in Scoggins, the petitioner here should reap no benefit from her deception.

Petitioner argues that judicial estoppel creates a "loop-hole" that allows defendants to escape judicial process and evade justice. The obligation to tell the truth and file accurate and honest pleadings is not the stuff of loop holes. Petitioner is not estopped from prosecuting her personal injury action because of a loop hole. Rather, she is barred as a result of a breach of her obligation to tell the truth and make full disclosure, as required by law, to Courts, trustees, creditors and others. The Supreme Court of Georgia, the Georgia Court of Appeals and the trial judge all acted properly in applying and upholding the principle of judicial estoppel as adopted and as is enforced in Georgia. Judicial estoppel is understandably an unattractive resolution to one in petitioner's position. However, that position was of petitioner's own making. Further, preserving the integrity of the courts by insisting upon consistent, accurate and honest pleadings in courts of law is critical to our legal system.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

RUSSELL D. WALDON
JANICE M. WALLACE
Counsel for Respondents
HARPER, WALDON & CRAIG
900 Circle 75 Parkway
Suite 1040
Atlanta, Georgia 30339
(770) 953-1710